

MING & CO. v. LEONG PING CHING

[O.C.J. (Gill J.) May 20, 1964]

[K.L. — Civil Suit No. 171 of 1962]

Contract — Construction of building — Defendant preventing plaintiff from completing work — Quantum meruit claim — Progress payments made — Whether entire or lump sum contract.

An entire contract is one in which the entire completion of the work by the contractor is a condition precedent to payment. A contract in respect of which progress payments are made from time to time is not an entire or lump sum contract. *Sumpter v. Hedges* ⁽¹⁾ distinguished.

Case referred to:—

(1) *Sumpter v. Hedges* [1898] 1 Q.B. 673.

CIVIL SUIT.

S. D.K. Peddie for the plaintiffs.

S. Y. Chan for the defendants.

Cur. Adv. Vult.

Gill J.: This is a claim on the basis of *quantum meruit* for the value of work done by the plaintiffs for the defendant in relation to a contract for the erection of certain additional floors to the back portion of premises No. 319, Batu Road, Kuala Lumpur, at which the defendant was running a maternity home.

There was no formal written contract between the parties, apart from their letters of 3rd January, 1961 which they wrote to each other in connection with the construction work. Apparently these letters were written on the conclusion of certain oral negotiations between Mr. Yap Khiam, a partner of the plaintiff firm, and the defendant.

The letter from the plaintiffs to the defendant was in the following terms:

"We have the pleasure to submit herewith our quotation for the erection of the above as per plan and details for your kind consideration:—

Cost of erection and supplying of materials for building additional floors to back portion of Shop No. 319, Batu Road, Kuala Lumpur for a total sum of \$25,000.00 (dollars twenty five thousand only).

Thanking you and hope that the above quotation is acceptable to you."

To this letter was annexed a list of general specifications which, in my opinion, need not be set out in detail as nothing turns on them.

The letter from the defendant to the plaintiffs was as follows:

"I wish to inform you that I have accepted your verbal quotation for the building of the above as per plan and details for the total sum of \$28,500 (dollars twenty eight thousand five hundred only), irrespective of the sum of \$25,000 quoted in your letter to me dated 3rd January, 1961.

Kindly proceed with the work as early as possible. Thanking you."

It is to be observed that the plaintiffs asked for a sum of \$25,000 for the work to be done,

A but the defendant agreed to pay a total sum of \$28,500. Each party has given its own explanation as to how the sum of \$28,500 was finally agreed upon. Mr. Yap Khiam (P.W.4) on behalf of the plaintiffs says that his quotation to the defendant for the work was \$28,500. The defendant's counter offer was \$25,000, but she eventually agreed to pay \$28,500. According to B Mr. Yap, no alteration to the pillars as shown in P.3 was discussed when the price of \$28,500 was agreed upon. The defendant, on the other hand, says that she quoted \$25,000 to Mr. Yap. Mr. Yap brought back the plans, had a talk with her and pointed out that if she wanted the C pillars to be built inside the walls, she would have to pay an additional sum of \$4,000. She went on to say that after much discussion she agreed to pay an additional sum of \$3,500, making the total of \$28,500.

Of the two explanations offered, the one by the defendant seems to me to be more logical. D I therefore accept her story that there was discussion about the siting of the pillars before the contract price of \$28,500 was agreed upon, although I must hasten to add that in view of the evidence on behalf of the plaintiffs I also make a finding that there were discussions about further alterations as the work progressed.

E There is also a dispute between the parties as to whether there was any time fixed for the completion of the work. Mr. Yap says that he did not discuss with the defendant the time for completion and that in fact no time was fixed. According to him, and there is very little dispute F about it, the defendant did not offer any period during which she would leave the house vacant to enable the construction of the additional floors. She kept on occupying the house all the time when work was going on on the site, using the front portion of the ground floor as a clinic and the rest of the building as a maternity home. G This naturally affected the progress of work which could not go on as quickly as the plaintiffs would have wished. The defendant, on the other hand, is equally emphatic that the time of completion was discussed. She asked Mr. Yap how long it would take to complete the work and he said, "Within four months." It is clear, however, H that nothing was mentioned in the letters which passed between the parties about the time within which the work was to be completed. In this connection I accept the story of Mr. Yap and make a finding of fact that there was no stipulation as to time and that consequently time was not of the essence of the contract.

I The plaintiffs started work on 13th January, 1961. Admittedly work progressed satisfactorily through January and the defendant made what she called an advance payment of \$5,000 on 30th January, 1961. She was also satisfied with the progress of work in February and paid an

advance of \$2,000 on 12th February, 1961. According to the defendant, after the Chinese New Year less men turned up for work whereupon she telephoned Mr. Yap to ask why there were only so few workers, and Mr. Yap replied to say that it was not possible for him to go on with the work on the estimated cost of the building because he had miscalculated and asked her to give him another \$3,000, to which she did not agree. She went on to say that work did not progress satisfactorily in the months of April and May, but nevertheless she made her next advance payment of \$2,000 on 18th May, 1961. She further said that she asked Mr. Yap to hurry up with the work but that the work stopped on or about 19th May, 1961 when no labourers turned up for work and when she saw the labourers remove the concrete mixers, iron bars and other implements of work. She telephoned Mr. Chen Chee Ming (P.W.1) to ask why the implements of work were being removed. He said that work was difficult to complete and suggested to her to find some one else to do it.

The evidence of Mr. Chen Chee Ming, very briefly, is that it was Mr. Yap who negotiated the terms of the contract and that he himself did not at any time decide that he was going to give up the building contract. By 19th May, 1961 work on the ground floor was finished and work was beginning on the second floor. The most difficult part of the contract was the foundation and reinforced concrete work which had been completed by 19th May, 1961, thus completing about 30% of the work. In the course of the work some changes were instructed by the defendant such as the extension of the column on one side and the extension of the pillars outwards on both sides so as to get a bigger floor space. He went on to say that it would have cost \$28,500 to complete the building and that it was not because he thought that it would cost more than \$28,500 that his firm abandoned the contract. The amounts paid by the defendant were progress payments, although they were mentioned in the receipts as advance payments.

The evidence of Mr. Yap in this connection is that work on the site stopped on 19th May, 1961 because the defendant complained that the progress of work was slow and that she wanted to do the work herself. He attended at the site when the work was going on, and he removed the mixers and the other materials from the site because the defendant said she wanted to take back the work and also because the mixers were taking up space there. According to him, he had done 40% of reinforced concrete work which was to take the weight of the rest of the structure. This witness has also given evidence to say that instructions for certain alterations were given by the defendant two months after the work got started. These alterations involved the hacking

A of the existing pillars in order to link the reinforced pillars. When he was working on these alterations he agreed with the defendant that the additional cost would be \$3,000.

B As I have stated above, some alterations were discussed before the original contract price of \$28,500 was agreed upon, but I am satisfied on the evidence that some further alterations were carried out during the course of the work at the request of the defendant. Apart from any dispute which may have arisen between the parties as regards additional payment for these alterations, it seems clear to me that the defendant was getting impatient because of what she considered the rather slow progress of the construction work. In this connection I accept the plaintiffs' evidence that work had necessarily to be slow because the defendant continued to use the building as a maternity home. The defendant was herself to blame if she failed to get any agreement from the plaintiffs as to the period C within which the work was to be completed. In view of her impatience, I find a lot of truth in the plaintiffs' assertion that she wanted to take back the work and do it herself, and it was in consequence of this that the work came to a stop on 19th May, 1961.

E On 23rd May, 1961 the defendant caused a letter to be sent by her solicitors to the plaintiffs alleging that the work was not progressing to her satisfaction and charging them with having abandoned the contract by stopping work completely on 19th May, 1961 and removing without her consent all the materials and equipment from the site of work. The letter ended with a notice F that unless the plaintiffs recommenced to work within two weeks of the date of the letter and completed the construction of the building within two months the defendant would employ another contractor to complete the construction of the building and claim any sum which she expended in excess of the contract price together with damages for breach of contract in consequence G of the unreasonable delay in completing the building.

H The plaintiffs' solicitors replied by their letter of 3rd June, 1961, alleging that the defendant herself had instructed the plaintiffs to stop working and had remarked that she could get some other contractor to complete the work. It was also stated in this letter that the original price agreed upon was \$28,500 but that the defendant instructed the plaintiffs to carry out alterations to the original plans amounting to \$3,000 which was agreed to by her. The last I paragraph of the letter said:—

"Please let us know as soon as possible if you now want our client to continue with the work and if so arrangements will have to be made between your client and our client so that a proper agreement could be agreed upon by both parties in connection with this matter."

The defendant's solicitors then wrote their letter of 6th June in which it was denied that the defendant instructed the plaintiffs to stop work, although she admitted that she had constantly complained to the plaintiffs of the slow progress. The last paragraph of this letter stated as follows:—

"As your client has not recommenced work nor did he give any indication that he will continue the work my client has made other arrangements to complete the building."

The correspondence between the parties after 19th May, 1961 gives clear indication as to the disputes between the parties. Whatever other construction may be placed upon this correspondence, it seems clear that the plaintiffs had no intention of abandoning the contract. They suggested, and they were quite right in doing so, that there should be a proper agreement drawn up between the parties so as to avoid any future disputes. Here was an opportunity for the defendant to get a definite written contract as to the time within which the building should be completed. It was open to her to refuse to pay any more money notwithstanding the plaintiffs' allegations that she had agreed to pay \$3,000 in respect of certain alterations to the original plans, but she had no right to make other arrangements to complete the building before the end of two weeks in which she had asked the plaintiffs to recommence work by her letter of 23rd May, 1961.

She has stated in her evidence that she was not prepared to enter into a proper contract with the plaintiffs and that she had made up her mind, whatever happened, that she was going to finish the work herself. She had made up her mind that way on 5th June, 1961. She had thus clearly made up her mind not to let the plaintiffs complete the building. She would have been entitled to do that had she waited for the period of her notice to expire, but in view of her attitude she was clearly in breach of contract. Moreover, this conduct on her part clearly shows that she herself was responsible for the stoppage of work. I therefore hold that the defendant wrongfully terminated the contract on 6th June, 1961. As the defendant prevented the whole of the work from being carried out, the plaintiffs have a remedy either on a *quantum meruit* for what they have done or by way of damages. They have elected to base their claim on *quantum meruit*, and on this they are entitled to succeed.

The main defence to the claim is that this was a lump sum or an entire contract which was abandoned after a part of the work had been done and that consequently on the authority of *Sumpter v. Hedges* ⁽¹⁾ the plaintiffs have no right to sue on *quantum meruit*. The answer to that is that in the first place the plaintiffs did not abandon the work, and, in the second place, this was not an entire contract. An entire contract

A is one in which the entire completion of the work by the contractor is a condition precedent to payment. To my mind, a contract in respect of which progress payments are made from time to time is not an entire or lump sum contract. The payments which were made in this case have been referred to as advance payments, but there is evidence that they bore relation to the work done. The doctrine of *Sumpter v. Hedges* therefore, in my opinion, has no application to this case.

The defendant has set up a counterclaim in respect of the amount which she spent over and above the total amounts which she had paid to the plaintiffs for completing the building. On this she is not entitled to succeed because of the breach of contract on her part in not allowing the plaintiffs to complete the work.

As regards the plaintiffs' claim on *quantum meruit*, they have produced bills and receipts for a sum of \$9,281.74 in respect of the cost of materials and labour charges, etc. The amount claimed is set out in their letters to the defendant of 11th May, 1961 and 24th June, 1961. The difference between the total of the receipts and the amount claimed represents services and office expenditure and a small margin of profit which a building contractor normally makes. In any event, the amount claimed has not been seriously challenged. The total value of the work done is estimated at \$11,119, against which a sum of \$9,000 has already been paid, leaving a balance of \$2,119. I therefore allow judgment for the plaintiffs for the sum of \$2,119 and dismiss the counterclaim. The defendant must also pay the plaintiffs' costs of the action as taxed.

Judgment for the plaintiffs.

Solicitors: Skrine & Co.; S. Y. Chan.

G LIM CHUI LAI v. ZENO LIMITED

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah F.J.) June 1, 1964]

[K.L. — Federal Court Civil Appeal No. 84 of 1963]

H *Contract — Construction of culverts — Cancellation of contract — Bailee selling construction materials to 3rd party — Whether 3rd party acquires title — Bailee claiming materials to be partnership property — Contracts (Malay States) Ordinance, 1950, s. 193.*

Sale of Goods — Bailee disposing off goods to 3rd party — Whether bailee can give good title — Sale of Goods (Malay States) Ordinance, 1957, s. 27.

Practice and Procedure — Point not pleaded or taken at trial — Whether can be entertained on appeal.

I One T the chairman of the respondent company's board of directors entered into an agreement sometime in January 1961 with a contractor named A who had secured contracts from the Petaling Jaya Authority for construction of culverts under which the respondents were to provide A with all materials for his culverts and also the finance needed to carry out his contracts. The respondents then bought the materials for the project and